

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 35-93:

INTERNATIONAL UNION OF OPERATING)

ENGINEERS, LOCAL 400, AFL-CIO,)

Complainant,)

- VS -)

CITY OF CUT BANK,)

Defendant.)

FINAL ORDER

The Findings of Fact; Conclusions of Law; and Recommended Order were issued by Joseph V. Maronick, Hearing Examiner, on September 30, 1993.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order was filed by Selden S. Frisbee, Attorney for the Defendant, on October 15, 1993.

Oral arguments were scheduled before the Board of Personnel Appeals on Wednesday, November 17, 1993.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. *IT IS ORDERED that the Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order are hereby denied.*

2. *IT IS ORDERED that the Recommended Order be amended to add the phrase "as to matters that are mandatory subjects of bargaining" immediately after the word "members" in the Recommended Order.*

3. IT IS ORDERED that this Board adopts the Findings of Fact; Conclusions of Law; and Recommended Order as amended as the Final Order of this Board.

DATED this 18 day of December, 1993.

BOARD OF PERSONNEL APPEALS

By Willis M. McKeon
WILLIS M. MCKEON
CHAIRMAN

Board members Henry, Talcott and Schneider concur.

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 1st day of December, 1993:

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STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 35-93

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 400,
AFL-CIO,

Complainant,

vs.

CITY OF CUT BANK,

Defendant.

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

The International Union of Operating Engineers, Local 400, AFL-CIO, hereinafter the Complainant, filed an unfair labor practice charge on January 14, 1993. The charge alleged the City of Cut Bank, hereinafter the Defendant, was:

1. violating Section 39-31-401(5) MCA by unilaterally adopting new personnel policies which substantially altered working conditions,
2. was violating Section 39-31-401(5) MCA by direct discussions with employees of the bargaining unit without representation of the local union and
3. was violating Section 39-31-401(3) MCA by harassing employees of the bargaining unit.

The Defendant on January 29, 1993 denied any violations as alleged and moved to dismiss the charge. On April 23, 1993, the Motion to Dismiss was denied and the matter set for hearing.

A hearing was conducted before Joseph V. Maronick, duly appointed Hearing Officer of the Board on July 29, 1993. Parties

1 present, duly sworn and offering testimony included: Shop Stewart,
2 William Hagen; City Clerk, Marie Mitch; Mayor, Brian Buchanan; and
3 City Superintendent, Loren Lowry. Documents admitted to the record
4 without objection were Joint Exhibits A and B and Defendant
5 Exhibits 1 through 6. Administrative Notice without objection was
6 taken to the charge, response, investigation report, motions, and
7 supporting briefs, all requests and responses including
8 interrogatories, and related documents. Post hearing briefs were
9 received August 30, 1993, and response briefs on September 3, 1993.

10 II. FINDINGS OF FACT

11 1. The Defendant independently developed a Personnel Policy
12 and Procedures Manual (Joint Exhibit A) and in October 1992 asked
13 the Complainant union members to come to City Hall and pick up and
14 sign for receipt of the manual. Prior to manual completion, the
15 Defendant used past practices which they alleged were either known
16 to all staff or contained in a loose leaf notebook available to any
17 Complainant union members.

18 2. The content of the manual was, according to the Mayor,
19 who was largely responsible for compiling the manual, developed
20 from:

- 21 1. policies, letters, or other documents
22 contained in a loose leaf notebook;
- 23 2. his recollection of past practices;
- 24 3. procedures in place in another Montana
25 city; and,
- 26 4. a source book he purchased.

27 3. The manual established a formalized discipline and
28 discharge procedure, pages 11 through 15. The procedure identifies
types of discipline, warning steps, three groups of violations,

1 reprimand content, and record retention. It also includes a
2 section regarding employee rights. The Defendant pointed out in
3 Post-Hearing Brief page 2 that since January 26, 1978, the city
4 "had enforced a policy of steps or procedures of warning,
5 suspension, and discharge." Exhibit 3 addresses, "General
6 Policies" "(safety)" requiring "protective head gear... must be
7 worn at all times, failure to comply with this requirement, subject
8 to exceptions listed below shall be handled as follows.

- 9 a. Warning of noncompliance, (written) to
10 employee, and file.
11 b. Suspension of employee (Minimum of one
12 day without pay)
13 c. Discharge of employee

14 4. The manual also, according to the Complainant, witness,
15 Mr. Hagen, changed annual leave accrual if a person was on leave
16 more than 15 days and limited use of sick leave for care of
17 immediate family members. The Defendant contended the accrual of
18 sick leave policies were already in existence written or unwritten
19 at the time the manual was adopted.

20 5. The Complainant charged that by asking each union member
21 to accept and sign for a copy of the employee manual, the Defendant
22 violated Section 39-31-401(5) MCA. Citing numerous cases including
23 General Electric Company, 150 NLRB 192, 194 (1964) enforced, 418
24 F.2d 736 (2nd CIR. 1969) Cert denied, 397 U.S. 965 (1970), the
25 Complainant pointed out in Post-Hearing Brief page 7 that the
26 Defendant must first notify the union of the manual and allow an
27 opportunity to bargain regarding its contents. It may not
28 individually notify bargaining unit members of the existence of the
manual and require their acceptance by an individual signing for

1 the manual. The Defendant indicated in the Post-Hearing Brief that
2 in a letter dated November 19, 1992, the Defendant advised the
3 Union:

4 "if there are 'new' work rules that are in
5 direct conflict with the specific provisions
6 of the union agreement, the City will be happy
7 to discuss these with you. . . .

8 I also take exception to the second paragraph
9 in your letter where you contend that rules
10 and policy changes must be cleared through
11 your office, prior to notification being
12 issued to the affected employees. Where in
13 the world did you get the idea that Local 400
14 is the final arbitrator of policies to be
15 adopted by the city of Cut Bank?

16 6. Regarding the third element of the charge, harassment of
17 unit members in violation of Section 39-31-401(3) the Complainant
18 pointed out that union members were required to use a time clock,
19 subject to strict coffee break time limits, could no longer use
20 city property after hours, or use city vehicles during lunch break.
21 The were also denied use of the city shop for a union meeting.

22 7. The time clock use, according to the Defendant, was to
23 address staff work attendance problems and help identify project or
24 work times in the street department. The intent was not to affect
25 in any way union membership or union members. All union members
26 were not required to use the time clock.

27 8. Coffee break rules were uniformly applied to all city
28 staff and required the breaks be taken at the place of work rather
29 than at local cafes or at other locations. The rule enforcement
30 only affected nine union members in the street department. Three
31 other union members in the Water Department were already, it
32 appears, taking their coffee breaks in their water department work
33 location.

1 9. Some members of the bargaining unit had been allowed to
2 use city vehicles for lunch travel. This privilege was changed for
3 all city employees except four nonunion employees who, because of
4 their work responsibilities, are on call 24 hours a day and
5 normally have availability of a city vehicle.

6 10. The city shop and other buildings had been open on a
7 limited basis for employee use or union meetings. The city
8 determined because of security and other reasons to eliminate the
9 after hour use of all city buildings by employees. No exceptions
10 to the policies were provided to any employees.

11 III. CONCLUSIONS OF LAW

12 1. The Board of Personnel Appeals has jurisdiction over this
13 complaint under Sections 39-31-401, 103(7), MCA and under
14 Implementation Rules of Sections 24.26.601 and 24.26.680-685 ARM.

15 2. The Montana Board of Personnel Appeals has held:

16 . . . A unilateral change, that is a change
17 initiated by the employer without bargaining
18 with the union, in a mandatory subject of
19 bargaining is a refusal to bargain in good
20 faith and is a per se unfair labor practice,
21 NLRB v. Katz, 369 U.S. 736 (1962).

22 The Montana Supreme Court has approved the
23 practice of the Board of Personnel Appeals in
24 using federal court and NLRB precedents as
25 guidelines in interpreting the public employ-
26 ees collective bargaining act and the state
27 act is so similar to LMRA State Department of
28 Highways v. Public Employees Craft Council,
165 Mont. 349, 529 P2d 785, 87 LRRM 2101
(1974); APSCME Local 2390 v. City of Billings,
171 Mont. 20, 555 P2d 507, 39 LRRM 2753
(1976); State ex rel. Board of Personnel
Appeals v. District Court, 183 Mont. 23 598
P2d 1117, 103 LRRM 2297 (1979); Teamsters
Local 45 v. State ex rel. Board of Personnel
Appeals, 195 Mont. 272, 635 P2d 1310, 110 LRRM
2012 (1981); City of Great Falls v. Young
(Young III), 211 Mont. 13, 686 P2d 185, 119
LRRM 2682, (1984).

1 The Public Employees Collective Bargaining Act, follows Katz
2 supra. The U.S. Supreme Court held in 1962 that an employer's
3 unilateral change in a condition of employment. . .may be held to
4 violate Section 8(a)(5) [similar to Section 39-31-401(5) MCA] even
5 in the absence of a finding that the employer was guilty of over-
6 all bad faith bargaining because conduct amounts to a refusal to
7 negotiate about the matter and must of necessity obstruct
8 bargaining, AAUP v. Eastern Montana College, ULP 2-82 (1982).

9 The Board similarly relied on Katz in finding that unilateral
10 imposition of an in-district residency requirement was an unfair
11 labor practice, MEA v. Mussellshell County School District
12 (Roundup), ULP No. 6-77 (1977).

13 Once practices are established, an employer is
14 "required to bargain in good faith; unilateral
15 changes. . .even if (the practices) are not
16 contained in the contract; cannot be changed
17 unless. . .there exists a waiver by the party
18 to whom the duty to bargain is owed. In the
19 instant case. . .(no waiver) was obtained by
20 the Defendant prior to making the change in
21 evaluation procedure." Bozeman Education
22 Association v. Gallatin County School District
23 No. 7 (Bozeman), ULP No. 43-79 (1981).

24 3. The Defendant unilaterally changed the city policies
25 which are a mandatory subject of bargaining without prior
26 negotiations in conformance with contract window, and/or contract
27 terms as well as applicable labor law. The policy was adopted
28 October of 1992 then in November of 1992 one month later after
notice from the Complainant, the Defendant offered to discuss the
adopted policies. In the same letter, however, the Defendant
challenged the exclusive bargaining representative's standing to
challenge adopted policies.

1 4. The Defendant's position that the policies were not
2 changed is not supported by the record. For example, the one page
3 disciplinary policy and any unwritten disciplinary policies which
4 even the Defendant's witnesses could only vaguely recall or explain
5 became four full typewritten pages and one paragraph on a fifth
6 page. The policy not only became much more explicit but was based,
7 in part, on information from another city and a reference manual
8 concerning which the Complainant representative was never advised.
9 The Defendant changed the policies unilaterally without bargaining
10 in violation of Section 39-31-401(5) MCA (see case rights
11 Complainant's brief pages 5 and 6).

12 5. The Defendant's request of individual bargaining unit
13 members to receive and sign for the policy manual is also a
14 violation of Section 39-31-401(5). In General Electric Company,
15 supra the Court indicated collective bargaining obligation
16 requires:

17 recognition that the statutory representative
18 is the one within whom (the Employer) must
19 deal in conducting bargaining negotiations,
 and that it can no longer bargain directly or
 indirectly with the employees.

20 See also Medo Photo Supply Corporation vs. NLRB, 321 US 678,
21 14 LRRM 581 (1944) R&L Carriage and Sons 292 NLRB No. 59 131 LRRM
22 1695 (1989); Wings and Wheels 139 NLRB 578, 51 LRRM 1341 (1962),
23 enforced, 324 F.2d 495, 54 LRRM 2455 (CA 3 1963), in which the
24 Court held the employer dealing directly with employees rather than
25 the bargaining agent is also a violation of the duty to bargain in
26 good faith.

27 6. The Defendant's actions in uniform application of old and
28 new city policies are not found to have been to discourage or

1 encourage union membership. Regardless of whether an employee was
2 or was not a union member the policies would apply. A violation of
3 Section 39-31-410(3) is not found. Inasmuch as a violation of
4 Section 39-31-401(5) has been found, nonviolation of Section 401(3)
5 is inconsequential to the order remedy.

6 IV. RECOMMENDED ORDER

7 The Defendant is hereby found to have violated
8 Section 39-31-401(5) MCA and must not apply new policies or
9 strictly enforce previously unenforced policies against the
10 Complainant Bargaining Unit members.

11 V. SPECIAL NOTE

12 In accordance with Board Rule ARM 24.26.684 the above
13 RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless
14 written exceptions are filed within twenty (20) days after service
15 of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER
16 upon the Parties.

17 Entered and dated this 30 day of September, 1993.

18 BOARD OF PERSONNEL APPEALS

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20 Joseph V. Maronick
21 Joseph V. Maronick
22 Hearing Examiner
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